(6)

No. 84-1560

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THE PRESS-ENTERPRISE COMPANY, A CALIFORNIA CORPORATION,
Petitioner,

—v—

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF RIVERSIDE,
Respondent.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Complainant,

—v—

ROBERT RUBANE DIAZ,
Defendant.

ON WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA AS *AMICI CURIAE*

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INTEREST OF AMICI*

For sixty-five years the American Civil Liberties Union and its state affiliates, including amicus American Civil Liberties Union of Southern California, have been dedicated to the cause of personal liberty through a vigorous defense of the safeguards embodied in the Bill of Rights.

The present case raises issues of particular interest to the ACLU and ACLU of Southern California because it involves an apparent, although we believe misconceived, clash between two fundamental civil liberties. On the one hand, the ACLU and ACLU of Southern California have long asserted the paramount importance of a free press. Thus, in Nebraska Press Association v. Stuart, 427 U.S. 539 (1976),

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*/ Letters of consent from all parties to the filing of this brief are being filed with the Clerk of the Court.

the ACLU participated as amicus curiae urging the invalidity of a prior restraint in the context of an ongoing criminal proceeding. On the other hand, the ACLU and ACLU of Southern California have long supported the right of every criminal defendant to a fair trial before an impartial tribunal. The ACLU therefore joined in Sheppard v. Maxwell, 384 U.S. 333 (1966), urging that the petitioner had been deprived of his Sixth Amendment right to a fair trial by prejudicial publicity.

This historic commitment to both sides of the "free press - fair trial" debate led the ACLU to participate as amicus curiae in several subsequent cases involving these issues including Gannett v. DePasquale, 443 U.S. 308 (1979); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980); and Waller v. Georgia, 104 S. Ct. 2210 (1984), and place amici in a unique position to aid the Court in resolving this debate.

STATEMENT OF THE CASE AND POSITION OF AMICI

On December 23, 1981, Robert Rubane Diaz was charged with the murder of 12 hospital patients by administering massive doses of the heart drug lidocaine. On July 6, 1982 the preliminary hearing commenced in the Riverside Municipal Court. The Court granted defendant's motion to exclude the public and press from the hearing pursuant to California Penal Code Section 868. The preliminary hearing was held over a period of 41 days and Diaz was held to answer on all charges. The Court sealed all transcripts of that extended hearing.

About seven months later the prosecutor and petitioner sought to have the transcripts released to the public. Defendant opposed this motion, claiming that release of the transcripts would result in publicity that would prejudice his right to a fair trial. On February 10, 1983, the Riverside Superior Court found that while

the material contained in the transcript was not "inflammatory" or "exciting," there was "a reasonable likelihood that unsealing all or any part of the transcript open might prejudice the defendant's right to a fair and impartial trial," and denied the request to unseal the transcripts (Joint Appendix, page 60). On appeal, this order was affirmed by the California Supreme Court which held that the First Amendment access right does not extend to preliminary hearings. Press-Enterprise v. Superior Court, 37 Cal. 3d 772, 691 P.2d 1026, 209 Cal. Rptr. 360 (1984).

SUMMARY OF ARGUMENT

Amici respectfully submit that:

The right of access to judicial proceedings extends to preliminary hearings which are an important part of the adjudication of criminal charges. Closed judicial hearings are flatly inconsistent with our constitutional tradition and

ultimately undermine the interests of criminal defendants. Openness supports and preserves the integrity of our judicial system, ensures fairness in criminal proceedings, and thereby serves the interests of the public, of the prosecution, and of criminal defendants.

Public proceedings play a vital structural role in our system of justice and work for the benefit of all participants by letting the public see that justice is being done. This structural value of promoting fairness is as important and applicable in preliminary hearings, as in criminal trials, voir dire proceedings, and pretrial suppression hearings - all of which this Court has held must be open. Moreover, the values served by openness accrue to the benefit of criminal defendants and society regardless of who seeks to secure openness.

Closure is an extraordinary step which should only be used sparingly, and then only

when there are specific findings that closure is essential and that closure is narrowly tailored to serve those interests. By failing to recognize the constitutional right of access to preliminary hearings and by allowing closure as a matter of right, the California Supreme Court has significantly eroded the right of open judicial proceedings enunciated by this Court. Accordingly, the judgment below should be reversed.

ARGUMENT

A. Openness Supports And Preserves The Integrity Of Our Judicial System And Improves The Quality Of Judicial Proceedings Thereby Aiding The Interests Of Both Society And Criminal Defendants

The openness of judicial proceedings is an essential quality of our system of law and an integral facet of American society. Whether openness is based upon the Sixth

Amendment right of the accused to a public trial, Waller v. Georgia, 104 S. Ct. 2210 (1984); Sheppard v. Maxwell, 384 U.S. 333 (1966), or the First Amendment right of public access, Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982), it serves values important to society, criminal defendants, and prosecutors.

Although most of the recent case law on the value of public trials has been based on the First Amendment, "there can be little doubt that the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public." Waller v. Georgia, 104 S. Ct. at 2215.

The right of access to criminal proceedings plays a significant structural role in the functioning of the entire judicial process. Access allows "the public

to participate in and serve as a check upon the judicial process -- an essential component in our structure of self-government." Globe Newspapers, 457 U.S. at 606; Richmond Newspapers, 448 U.S. at 587 (Brennan, J., concurring).

This structural role of openness flows from the central value served by open criminal proceedings -- the promotion of fairness -- and satisfies vital First and Sixth Amendment policies. As the Court recently emphasized, "Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and society as a whole." Globe Newspaper, 457 U.S. at 606 (footnote omitted, emphasis added).

In an open society, public trials are one of the important protections of the rights of an accused since only through knowledge about such proceedings can the

public ensure that defendants are fairly treated. Gannett, 443 U.S. at 380. Indeed, it is a function of a free press to ensure fairness to the defendant by reporting on judicial proceedings and thereby scrutinizing the administration of justice. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 492 (1975).

The right to a public trial promotes fairness because it "has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution" and works as "an effective restraint on possible abuse of judicial power." In Re Oliver, 333 U.S. 257, 270 (1948). This Court has repeatedly stated that public scrutiny of the functioning of courts is an effective means of assuring that judges, prosecutors, and defense attorneys perform responsibly and not arbitrarily. Sheppard v. Maxwell, 384 U.S. at 350; Cox Broadcasting Corp. v. Cohn, 420

U.S. at 492. Thus, public trials serve essentially the same function for the public, for the prosecution, and for defendants: they guard against the abuses and excesses typical of secret judicial proceedings. Secret trials have rightly been called a "menace to liberty" and have rightly been condemned because of the abuses and excesses of the Spanish Inquisition's and the English Court of Star Chamber's secret proceedings. In Re Oliver, 333 U.S. at 268-69. Not surprisingly then, openness is an "indispensible attribute of an Anglo-American trial." Richmond Newspapers, 448 U.S. at 569.

Openness furthers a number of other important goals in judicial proceedings. Openness "enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." Press-Enterprise, 464 U.S. at 508; Richmond Newspapers, 448 U.S. at 569-71.

It also helps to improve the quality of testimony, induces unknown witnesses to come forward with testimony, and discourages perjury. Gannett, 443 U.S. at 383; Richmond Newspapers, 448 U.S. at 569; Press- Enterprise, 464 U.S. at 108; Waller,104 S. Ct. at 2215.

Openness also has what is sometimes referred to as a "community therapeutic value." Press-Enterprise, 464 U.S. at 508; Richmond Newspapers, 448 U.S. at 571. Open proceedings provide an outlet for the public's concerns and emotions which result from criminal acts. Part of this community need may stem from an "urge for retribution." Richmond Newspaper, 448 U.S. at 571. The public also has a strong need to see instances of police or prosecutorial misconduct revealed and to be assured that the criminal justice system is functioning fairly. As the Court noted in Richmond

Newspapers, 448 U.S. at 571,/1/ "The accusation and conviction or acquittal, as much perhaps as the execution of punishment, operat[e] to restore the imbalance which was created by the offense or public charge. . . ." Proceedings held in public vindicate the concerns of the victims of crime, the community, and defendants in knowing that the criminal system operates fairly and justly. Press-Enterprise, 464 U.S. at 509; Richmond Newspapers, 448 U.S. at 571-72.

B. The Values Secured By Openness In Criminal Trials Apply With Equal Force To Preliminary Hearings

The values ensured by access to criminal "trials" are also vitally important to the proper functioning of other criminal proceedings such as pretrial suppression

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1/ Quoting Mueller, Problems Posed by Publicity to Crime and Criminal Proceedings, 110 U. Pa. L. Rev. 1, 6 (1961).

hearings, Waller, 104 S. Ct. 2210, and voir dire proceedings (whether or not they are deemed to be a part of the trial). Press-Enterprise, 464 U.S. 501. As this Court recognized in Waller and Press-Enterprise, both suppression and jury selection proceedings occupy important roles in our criminal justice system.

This Court, therefore, has upheld a constitutional right of access to suppression hearings because the aims and interests protected by the accused's rights to public trial "are no less pressing in a hearing to suppress wrongfully seized evidence. . . . [which often is] as important as the trial itself. . . . In Gannett, as in many cases, the suppression hearing was the only trial, because the defendants thereafter pleaded guilty

pursuant to a plea bargain." Waller, 104 S. Ct. at 2215-16./2/

Similarly, preliminary hearings occupy a vital role in the functioning of California's criminal justice system. Preliminary hearings contain many of the same procedural attributes and safeguards as trials and often function as the sole hearing of a case on its merits in California./3/ In a very real sense, then, preliminary hearings

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2/ In Waller, the Court focused on the structural role of openness in extending the right of access to suppression hearings. The Court did not look to either the history of suppression hearings or the issue of whether they constituted part of the "trial" within the meaning of the Sixth Amendment. The Court was apparently extending Justice Steven's observation, that "the distinction between trials and other official proceedings is not necessarily dispositive, or even important, in evaluating the First Amendment issues," Press-Enterprise, 464 U.S. at 516 (Stevens, J., concurring), to the Sixth Amendment.

3/ We understand that other Amici are undertaking an extensive analysis of the procedural and functional similarity of preliminary hearings to trials in California. We will not duplicate that effort here.

"implicate all the policies that require that the trial be open to the public." Gannett, 443 U.S. at 436 (Blackman, J., concurring in part and dissenting in part); id. at 397 n.1 (Powell, J., concurring). Openness will promote fairness in preliminary hearings, encourage witnesses to come forward, discourage perjury, satisfy the community's cathartic needs, and, perhaps most importantly at this stage of the proceeding, act as a check upon the potential abuse of prosecutorial and judicial power. If the public is not allowed to see how preliminary hearings operate, then we cannot expect the public to exert any pressure to prevent the abuse of and for the improvement of such proceedings.

Because the values served by openness apply with equal force to preliminary hearings in California, it is in the interest of all parties, including criminal

defendants, to maintain strict standards for closure of such proceedings.

C. The Values That Openness Secure Apply Regardless Of Who Insists Upon Open Proceedings

The "fair trial - free press" debate has been framed in terms of a direct conflict between these two rights. The dilemma posed by this formulation was observed long ago by Justice Black: "If the inference of conflict raised by the last clause be correct [stating that the liberty of expression should be subordinated to the interest in judicial impartiality], the issue before us is of the very gravest moment. For free speech and fair trials are two of the most cherisned policies of our civilization, and it would be a trying task to choose between them." Bridges v. California, 314 U.S. 252, 260 (1941).

Amici, a staunch defender of both rights, believes that a choice between them

is unnecessary in the overwhelming majority of cases. "I would reject the notion that a choice [between free speech and fair trials] is necessary, that there is an inherent conflict that cannot be resolved without essentially abrogating one right or the other." Nebraska Press Ass'n v. Stuart, 427 U.S. at 611-12 (1976) (Brennan, J., concurring in judgment).

The conflict between these two fundamental rights is simply overstated. Openness in judicial proceedings serves interests common to both the public and defendants -- the promotion of fairness in our judicial system. Chief Justice Burger recently made this point clearly: "No right ranks higher than the right of the accused to a fair trial. But the primacy of the accused's right is difficult to separate from the right of everyone in the community to attend the voir dire which promotes

fairness." Press-Enterprise, 464 U.S. at 508.

In the overwhelming majority of criminal proceedings, openness poses no serious threat of prejudice to defendants, and, in fact, helps to promote fair trials. It is misleading to view this issue in terms of the rights of the press versus the rights of defendants. Assuredly there may be instances in which First and Sixth Amendment interests clash. In those extremely rare instances, closure may be justified, but "the presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." Press-Enterprise, 464 U.S. at 510; Waller, 104 S. Ct. at 2216.

The California Supreme Court has determined that closure of preliminary hearings is justified upon a finding of only a "reasonable likelihood of substantial prejudice." By allowing closure on such a general basis, without more, California has adopted an unconstitutional standard,/4/ and undermined the values of open proceedings, which apply both to the public and defendants.

The ease with which the standard enumerated by the California Supreme Court can be met - the trial court's simple incantation of the words "reasonable

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4/ The California Supreme Court did not require the trial court to consider alternatives to closure, Waller, 104 S. Ct. at 2217; Press Enterprise, 464 U.S. at 501; to consider closing only those parts of the hearing or sealing those parts of the transcript which might lead to prejudice, Waller, 104 S. Ct. at 2217; Press Enterprise, 404 U.S. at 501; and most basically failed to require articulated findings showing that the defendant's fair trial interests were truly threatened. Press-Enterprise, 464 U.S. at 510-11.

likelihood of substantial prejudice" - seriously undermines the continued existence of open preliminary hearings and threatens to erode the right of access to all adjudicatory proceedings. The need for openness - the promotion of fairness in our judicial system - is the same regardless of who seeks to ensure public proceedings. Given the great benefits of openness, no one - prosecutor or criminal defendant - should be allowed to obtlain closure merely by requesting it, which is precisely what happened below.

CONCLUSION

For all the foregoing reasons, the decision of the California Supreme Court in this case should be reversed.

Respectfully submitted,

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November 29, 1985